

BEFORE THE  
SURFACE TRANSPORTATION BOARD

INDIANA SOUTHWESTERN RAILWAY )  
CO. -- ABANDONMENT EXEMPTION -- ) DOCKET NO. AB-10652X  
IN POSEY AND VANDERBURGH )  
COUNTIES, IN )



**REPLY IN OPPOSITION TO APPEAL,  
MOTION TO HOLD IN ABEYANCE, AND  
REQUEST FOR DISCOVERY  
AND  
PETITION FOR EXEMPTION  
FROM 49 U.S.C. § 10904(e)**

**ENTERED  
Office of Proceedings**

**JAN 13 2011**

**Part of  
Public Record**

THE TOWN OF POSEYVILLE, INDIANA  
20 South Cale Street  
P.O. Box 194  
Poseyville, IN 47633

Replicant-Petitioner

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Attorney for Replicant-Petitioner

DUE DATE: January 13, 2011

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Pursuant to 49 C.F.R. § 1011.2(a)(7), the Town of Poseyville, Indiana (the Town) hereby replies in opposition to an Appeal and Motion to Hold in Abeyance filed by Indiana Southwestern Railway Co. (ISW) on December 30, 2010. This Reply includes opposition to ISW's Request for Discovery, a copy of which was attached to the Appeal and Motion to Hold in Abeyance.

Although the Town opposes ISW's Motion to hold the proceeding in abeyance pending completion of discovery, the Town, pursuant to 49 U.S.C. § 10502(a), petitions for an exemption from 49 U.S.C. § 10904(e) so that the Town's valuation evidence and argument need not be filed within 30 days after the filing of its OFA but instead can be filed within a reasonable period of time after the Board's disposition of ISW's Appeal-Motion to Hold in Abeyance. The Town should not be required to prepare this Reply for filing on January 13, 2011 at the same time that it would be required to prepare extensive evidence and argument on valuation of the rail line for

filing in a Request to Establish Conditions and Compensation for Financial Assistance required to filed on January 19, 2011 (30 days after the filing of the OFA). Thus, the evidentiary schedule should be suspended, but only until the Board can rule on ISW's pleadings.

### **BACKGROUND**

On December 20, 2010, the Town timely filed an offer of financial assistance (OFA) to purchase for \$376,600 the entire 17.2-mile rail line that had been authorized for abandonment.

On December 23, 2010, ISW filed a letter alleging that the Town is not financially responsible because its population is only 1,200 persons and because it would contract with a third person to operate the rail line.

On December 23, 2010, the Board, through Office of Proceedings Director Rachel D. Campbell, issued a decision that accepted the Town's OFA for filing. The Board there found that ISW had failed to rebut the presumption that as a governmental entity, the Town is financially responsible (at 2-3 and note 4).

ISW's Appeal is filed under 49 C.F.R. § 1011.2(a)(7) which provides for appeals to the Board of initial decisions of the Director of the Office of Proceedings acting under authority delegated by virtue of 49 C.F.R. § 1011.7(b).

ISW's Motion to Hold in Abeyance seeks a suspension of further evidentiary proceedings until the Town responds to ISW's Request for Discovery and until ISW files supplemental evidence to show that the Town is not financially responsible based on responses to the tendered discovery.

## **DECISIONAL STANDARDS**

The decisional standard governing disposition of ISW's Appeal of Director Campbell's decision is set forth in 49 C.F.R. § 1011.6(b) as follows:

... Appeals are not favored and will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice.

There is no known decisional standard for disposition of ISW's Motion to Hold in Abeyance and related Request for Discovery because it does not appear that any such Motion-Discovery Request has ever been filed in an OFA proceeding. The Town will show that such Motion-Discovery Request is inconsistent with the Board's discovery rules at 49 C.F.R. § 1114.21(a), and is wholly inconsistent with the statute governing OFA proceedings and the Board's rules that implement that statute.

## **REPLY IN OPPOSITION TO APPEAL**

The sole issue on appeal is whether Director Campbell made a clear error of judgment in finding that ISW failed to rebut the presumption that the Town, as a governmental entity, is financially responsible. There is no contention that there would be manifest injustice if the Town's OFA were to be accepted for filing, and there is absolutely no evidence to support any such determination if there had been such a contention.

At page 3 of the Appeal, ISW has acknowledged that it "has no further specific evidence at this time" that would support a determination that the Town is not financially responsible. Instead, at pages 4 and 5 of the Appeal, ISW merely reargues the evidence that it presented unsuccessfully to Director Campbell. ISW does not even attempt to show that the Director committed legal error in determining that such evidence is insufficient to rebut the presumption of the Town's financial responsibility.

ISW reargues that with a population of only 1,200 persons, the Town would likely have insufficient resources to purchase the rail line. (Appeal at 4). As to that contention, Director Campbell found that “(t)he size of the Town is not determinative here, especially given the Town’s valuation of the line.” (December 23, 2010 decision at 2, note 4). ISW has not shown, nor even attempted to show, that the Director’s finding in that respect constitutes a clear error of judgment.

ISW reargues that the Town’s plan to contract with a third party to operate the rail line shows that the third party rather than the Town should be the offeror. (Appeal at 4). As to that contention, the Director found that “the intent to use an experienced rail operator to provide rail service over the line does not preclude the Town from pursuing an OFA under the statute and Board rules.” (December 23, 2010 decision at 2, note 4). ISW has not shown, nor even attempted to show, that the Director’s finding in that respect constitutes a clear error of judgment.

ISW reargues that the Town’s complaint about having to pay a \$1,500 filing fee for its OFA shows that the Town most likely does not have the resources to buy the rail line. (Appeal at 4). The Director did not specifically respond to that contention, but it is evident that the contention is a non sequitur. The Town’s reluctance to pay the filing fee was based on the Town’s reading of the applicable regulation, not on an inability to pay the fee. Indeed, when contacted by Board Staff, the Town promptly paid the fee under protest.

In sum, the Appeal does not contain any basis for a finding that the Director clearly erred in judgment in determining that ISW failed to rebut the presumption that the Town is financially responsible. Accordingly, the Appeal should be denied.

**REPLY IN OPPOSITION TO MOTION TO HOLD  
IN ABEYANCE AND RELATED REQUEST FOR DISCOVERY**

Both ISW's Motion to Hold in Abeyance and its related Request for Discovery should be denied or rejected because they are inconsistent with the Board's discovery rules, and are wholly inconsistent with the OFA statute and Board regulations that implement that statute.

A proceeding under the OFA statute is an accelerated informal proceeding as to which discovery is not available. Thus, it is provided in 49 C.F.R. § 1114.21(a)(1) as follows (emphasis added):

(a) when discovery is available. (1) Parties may obtain discovery under this subpart regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding other than an informal proceeding. For the purpose of this subchapter, informal proceedings are those not required to be determined on the record after hearing and include informal complaints and all proceedings assigned for initial disposition to employee boards under § 1011.6.

It would be entirely inconsistent with accelerated OFA procedure to permit discovery to be conducted in OFA proceedings. That inconsistency would be magnified if discovery were to be permitted in the middle of an OFA proceeding in an attempt to undermine a finding of financial responsibility. Discovery is particularly inappropriate in the present OFA case because it was not submitted until after acceptance of the Town's OFA for filing.

The highly accelerated nature of OFA proceedings is well-established. OFA proceedings are so accelerated that no administrative appeal is permitted of a Board decision determining a net liquidation value-purchase price in an OFA case. *See Abandonment of R. Lines & Discontinuance of Serv.*, 365 I.C.C. 249, 261 (1981), and *Buffalo Ridge R.R., Inc. - Aban. bet. Manley, MN and Brandon, SD*, 9 I.C.C.2d 778, 779 (1993). In the latter case, referring to the ICC's earlier determination, the ICC said (at 779):

... The Commission explained that these decisions were intended by Congress to be final and that allowing appeals in this circumstance would introduce a delay that would be inconsistent with the statutory scheme ...

The delay in an OFA process that would be occasioned by ISW's Motion to Hold in Abeyance and related Request for Discovery would certainly be comparable to the delay in that process that would result from consideration of Administrative Appeals of OFA decisions determining conditions and compensation for financial assistance. It follows that the proposed Abeyance and Discovery are equally inconsistent with the statutory scheme for OFAs. ISW's Motion to Hold in Abeyance and related Request for Discovery should be denied or rejected on that basis.

#### **REQUEST FOR EXEMPTION FROM 49 U.S.C. § 10904(e)**

It is provided in 49 U.S.C. § 10904(e) that a request that the Board establish the conditions and amount of compensation for financial assistance is to be filed within 30 days after the corresponding OFA is made. In the present case, the Town's OFA was made on December 20, 2010. Accordingly, the Town's Request to Establish Conditions and Compensation for Financial Assistance (Request) is required to be filed on or before January 19, 2011.

Pursuant to 49 U.S.C. § 10502(a) and 49 C.F.R. § 1121.3, the Town hereby respectfully petitions that the Board grant an exemption from 49 U.S.C. § 10904(e) to permit the Town's Request to be filed beyond that 30-day period, i.e., within a reasonable time after disposition of ISW's Appeal, Motion to Hold in Abeyance, and Request for Discovery.

Strict adherence to the 30-day time deadline for filing Requests in this proceeding is not necessary to carry out the transportation policy of 49 U.S.C. § 10101. *See* 49 U.S.C. § 10502(a)(1). In particular, the sought exemption would be consistent with the policy of §

10101(2) in favor of fair regulatory decisions. Strict adherence to the 30-day time frame would not be fair because during that 30-day period the Town has been preoccupied with researching and preparing a Reply in opposition to ISW's inappropriately-filed Motion to Hold in Abeyance and related Request for Discovery. That task has prevented the Town from adequately preparing valuation evidence and argument for the Town's Request.

The proposed exemption would be of limited scope. *See* 49 U.S.C. § 10502(a)(2)(A). The short delay that would be occasioned by extending the filing date for the Request until the Board disposes of ISW's pleadings would be of limited scope. That short delay differentiates the requested exemption from the substantial delay that would result from ISW's Motion to Hold in Abeyance and related Request for Discovery. Thus, the Town's requested exemption would not be inconsistent with the OFA statutory scheme, as are ISW's pleadings. Accordingly, the requested exemption should be granted.



### **CONCLUSION AND REQUESTED RELIEF**

WHEREFORE, for the reasons stated, the Board should:

- (1) deny ISW's Appeal;
- (2) deny or reject ISW's Motion to Hold in Abeyance and related Request for Discovery; and
- (3) grant an exemption from 49 U.S.C. § 10904(e) to permit the Town's Request to Establish Conditions and Compensation for Financial Assistance to be filed beyond the 30-day period provided for in that statute, namely a reasonable period of time after the Board's disposition of ISW's Appeal, Motion to Hold in Abeyance, and Request for Discovery.

Respectfully submitted,



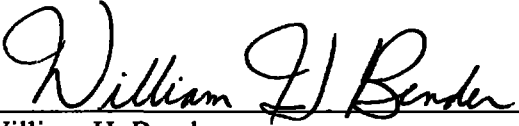
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Attorney for Replicant-Petitioner

DUE DATE: January 13, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that on January 12, 2011, I served the foregoing document, Reply In Opposition To Appeal, Motion To Hold In Abeyance, And Request For Discovery and Petition For Exemption From 49 U.S.C. § 10904(e), by overnight mail, on the attorneys for Indiana Southwestern Railway Co., William A. Mullins and Robert A. Wimbish, Baker & Miller, 2401 Pennsylvania Avenue, Suite 300, Washington, DC 20037, and on Ms. Venetta Keefe, Senior Rail Planner, Indiana Department of Transportation, 100 North Senate Avenue, Room N955, Indianapolis, IN 46204.

  
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William H. Bender